10-9-2014

Krinitt v. Idaho Dept. of Fish & Game Appellant's Brief Dckt. 42417

IN THE SUPREME COURT OF THE STATEOF IDAHO

No. 42417-2014

PERRY KRINITT,

Plaintiff-Appellant

vs.

IDAHO DEPT. OF FISH & GAME and

STATE OF IDAHO,

Defendants-Respondents

OPENING BRIEF OF PLAINTIFF-APPELLANT

Appeal from the Second Judicial District for Lewis County

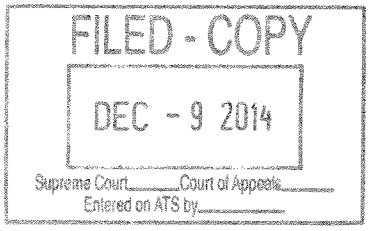
Honorable Michael Griffin presiding

Charles H. Carpenter

Residing at Missoula, Montana, for Appellant

Peter J. Johnson

Residing at Spokane, Washington, for Respondents



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STATEMENT OF THE CASE

Nature of the Action

This is a wrongful death action brought against the State of Idaho and its Department of Fish & Game (collectively "Fish & Game") pursuant to the Idaho Tort Claims Act. Plaintiff Perry Krinitt's son was the pilot of a helicopter which crashed during a survey flight, when one of the two Fish & Game biologists working on the flight allowed a clipboard to exit the helicopter and strike the tail rotor. The ensuing crash killed the pilot and both Fish & Game biologists. The November 2010 investigation report issued to Fish & Game by the United States Department of the Interior put this conclusion in even shorter terms: the accident was caused by the "failure to safeguard items in the aircraft." R. Vol. II, p. 352 This case, then, is about who failed to safeguard the item and how.

Proceedings Below

Krinitt made an administrative claim pursuant to the Idaho Tort Claims Act (I.C. § 6-905) on February 23, 2011, within the statutory period after the August 30, 2010 crash. Fish & Game did not respond. On August 30, 2012, Krinitt's complaint was filed in the District Court for the Second Judicial District, Lewis County. Fish & Game answered well after the deadline, and, after the initial scheduling conference,

discovery proceeded apace. Krinitt engaged well experienced helicopter crash investigation experts to examine the wreckage, and all the evidence concerning the crash, and both experts offered definitive conclusions claiming negligence. Krinitt submitted a rebuttal report to that produced by Fish & Game's expert; Fish & Game did not submit a rebuttal report to that submitted by Plaintiff.

Fish & Game moved for summary judgment on January 31, 2014. The Fish & Game motion was quite limited: it contended that there was insufficient evidence of what had gone on in the seconds before the helicopter crashed to assign negligence to it. As the motion's core argument, Fish & Game claimed that Krinitt was engaging in fact free speculation as to the exact mechanism for the cause of the accident. Fish & Game made no mention, in the motion, of the conclusions of either expert, or, indeed, of the fact that both sides had engaged experts who had conducted thorough investigations and issued reports, nor did Fish & Game acknowledge that the experts had given definitive opinions on the issue of causation.

Oral argument was heard on May 30, 2014, and the district court granted the motion on July 7, 2014. Despite the very limited nature of Fish & Game's motion, the district court's order was broad ranging, and included some fact free speculation on the part of the district court. The district court, following the lead of Fish &

Game, made no mention of the numerous investigations or the experts' conclusions. It agreed with Krinitt that "keeping control over loose items [during flight] is essential" and that the biologists "had a duty to control any loose items of their personal property inside the cockpit" and finally that "[f]ailure to do so would amount to negligence." R. Vol. II, pp. 396, 397. Having agreed with Krinitt about the legal framework here, the district court then found that Krinitt had not presented insufficient evidence that the clipboard that caused the accident was (or should have been) under the control of a Fish & Game employee. The district court cited no evidence for the proposition that anyone other than the Fish & Game biologists had responsibility for or control over the clipboard at any point during the flight.

In addition, the district court found that the exact mechanism of this accident – the clipboard moving to the rear – was not foreseeable, but that instead someone in the Fish &Game biologists' position would expect the clipboard to fall straight down. This finding seems to be based, in turn, on the district court's misunderstanding of where the helicopter was at the time of the crash: it was not descending vertically to the Kamiah airport, but was several miles away.

The district court filed final judgment in favor of Fish & Game on September 3, 2014, R Vol. II, p. 405, and Krinitt filed an Amended Notice of Appeal on

September 9, 2014. R., Vol. II, p. 407. This Court has jurisdiction under I.C. § 13-201.

Statement of the Facts

In this case, there is surprisingly little factual dispute about what happened. This was a Fish & Game survey flight, for the purpose of collecting data on salmon spawning on the Selway River. R., Vol. I, p.111. The helicopter company was under contract to provide services to Fish & Game as requested, under Fish & Game's operational control. *See* R., Vol. II, p. 288. One of the biologists was an experienced pilot himself, and had done the survey a number of times over the years. Just weeks before the mission, the other biologist volunteered to participate. At that point, the second biologist was not qualified under Fish & Game regulations to take part in the survey. R., Vol. I, pp. 117-118. The Fish & Game regulations are mandatory: if one is not qualified under the regulations to fly, one may not fly. R., Vol. I, pp. 112-113 and 133. The regional flight safety officer did not arrange the flight training that would have qualified the biologist, but instead told her that she could still fly if she completed certain steps, which did not amount to full compliance with the applicable rules. R., Vol. I, pp. 074-075, 082-087, 103-104. He had no authority under the regulations to excuse her from all the requirements, see Regional Summary at R., Vol.

II, pp. 326, 339-340, nor did she complete all of the steps set out for her. Nonetheless, she was allowed to fly on the mission.[1]

The biologists met with the pilot, the owner of the helicopter company, and the company's operations manager for a pre-flight briefing on the morning of the flight. R., Vol. I, pp. 137-148, 060-069, 121, 129-130, 132. Both the owner and the operations manager testified concerning this briefing, and both indicated that the less experienced biologist – who had apparently never flown in a helicopter – had had issues with motion sickness in the past. R., Vol. I, p. 144. Gear that the biologists were not necessarily going to use for the mission was strapped into external cargo bays. Items for use during the mission, including an aluminum Fish & Game clipboard, were taken inside the cockpit. R., Vol. I, pp. 139, 149, 069-071.

The helicopter was a Hiller 2E Soloy, and with a narrow bench seat, which can accommodate three people sitting directly abreast. *See* R., Vol. II. p. 360. The pilot sat in the middle, both hands holding the controls, with a biologist on each side – the

[1] Fish & Game disagrees with respect to the biologist's qualifications, but offers no evidence that the regulations permitted the flight safety officer to exempt her from all of the flight safety requirements, nor any evidence that she fully complied with the abbreviated requirements he did impose. The district court recited the facts showing that she was not qualified, but then concluded that the qualifications – which were a *sine que non* for her presence on the flight – did not play a but-for role in the crash.

more experienced, flight-qualified biologist (Larry Barrett) was on the left, the other biologist (Danielle Schiff) on the right. The helicopter took off and flew first towards a refueling location on the Selway River. Some 30 minutes into the flight, the pilot radioed that the helicopter would be making an unscheduled landing in Kamiah. No explanation was given by the pilot given for his stop, but, based on the evidence; the experts have offered opinions on the question. Within a short time after that the clipboard went out the right side door. The experts offered conflicting explanations of how the door came to be open – which formed the basis of their conflicting opinions that either (a) biologist Schiff or (b) the helicopter company, was at fault for the door being open.

All three experts were experienced at air crash investigation. As can be seen from their opinions, the district court's factual conclusions cannot be reconciled with the opinions of the experts offered by either side.

Douglas Stimpson

Krinitt's expert Doug Stimpson's qualifications to give the opinion testimony he offered in the district court, and his experience in both accident investigation and flight (including helicopter flight), are so extensive that counsel for Fish & Game

stipulated to them rather than sit through a recitation at his deposition. R., Vol. II, p. 397. For the benefit of the Court, Stimpson prepared an affidavit summarizing the description of his experience from the report he produced in this case. He works as an aviation safety investigator and an aviation accident reconstructionist for both aircraft and helicopters. R., Vol. II, p. 262. Stimpson has been engaged in this work for more than 40 years. *Id.* As part of the numerous aviation accidents that he has reviewed, analyzed, and reconstructed, he relies on his education, training, and experience in crash kinematics, piloting, maintenance, failure analysis, aircraft certification, aircraft manufacturing, crew factors, and wreckage investigation. *Id.* In the past 25 years, Stimpson has been retained as an expert aviation safety investigation and accident reconstructionist on more than 1,000 occasions. *Id.* He has testified in state and federal courts across the United States and has never failed to qualify as an expert in accident reconstruction. *Id.* He has investigated thousands of crashes. *Id.*

Stimpson has logged over 11,800 hours of flight time and holds the following current ratings issued by the Federal Aviation Administration: Airline Transport Pilot Multi-Engine Land ("ATP-MEL"); Airport Transport Pilot Single-Engine Land ("ATP-SEL"); Certified Flight Instructor Single Engine ("CFI"); Certified Flight Instructor Multi-Engine ("CFI-MEI"); Certified Flight Instructor Instruments

("CFII"); Certified Flight Instructor Helicopter (CFI-H); Commercial Pilot Single-Engine Seaplane ("SES"); Commercial Pilot Rotorcraft Helicopter ("CPR"); Certified Aircraft Dispatcher ("ADX"); Advanced Ground Instructor ("AGI"); Basic Ground Instructor ("BGI"); Airframe and Powerplant Mechanic ("A&P"); and an Inspection Authorization ("IA"). *Id.* at ¶4.

He has engaged in significant research and development with regard to numerous aspects of aircraft manufacturing, including production manufacturing work, product flight testing, methods engineering, development manufacturing, static load testing, aircraft fatigue testing, as well as aircraft fit, form, and function and field evaluation. *Id.* at ¶5. On numerous occasions Stimpson has been responsible for supervising flight and non-flight crew necessary for completing aviation missions.[2]

For this investigation, Mr. Stimpson reviewed the wreckage of the helicopter, documents produced in the various investigations, depositions of the key witnesses, and the documents produced by Leading Edge concerning the helicopter, and by Fish & Game concerning Schiff. R., Vol. II, pp. 203-211. Based on this review, Mr. Stimpson concluded that (a) it is likely that Schiff became nauseous (R., Vol. II, pp.

[2] In addition, Stimpson is employed as an instructor by the University of Southern California in Los Angeles, California, as an Aviation Safety and Security Program instructor with the Viterbi School of Engineering. *Id.*

213-217, 222, 232-233);[3] (b) Schiff "most likely" opened the door of the helicopter (R., Vol. II, pp. 220-223, 226-227, 228-230; *see also id.* at 234-234, 242 (passenger blocks door from opening)); (c) the clipboard exited the right door, which was Schiff's side of the helicopter. (R., Vol. II, pp. 219-220, 224-225); (d) the crash was caused by Schiff's clipboard exiting the cockpit through her open door and striking the tail rotor (R., Vol. II, pp. 218-220, 224-226, 231). In both his report, and especially in his deposition, Stimpson testified at length concerning the evidence upon which these conclusions were based.

Mr. Stimpson's expertise extends beyond coming to an opinion about what happened, physically, to cause the accident. Stimpson's experience as an owner/operator of a FBO facility- a fixed base operator- is also relevant here. For this case, Stimpson has examined the evidence – the rules and policies that apply to flights such as the one at issue, and employees of Fish & Game in the position of Schiff – and concluded Schiff did not meet Fish & Game's training requirement for her participation in the mission, and did not comply with the Fish & Game's briefing materials (and pilot instruction – *see* R., Vol. I, pp. 059, 138-139) that she maintain

[3] It is important to note that Stimpson is not saying that it is likely that Schiff became nauseous enough to vomit; rather he is saying that the evidence, as interpreted in his reconstruction, that she became nauseous enough for mitigation measures like increasing airflow in the cockpit and making a non-emergency stop to get medication that was stored on the outside of the helicopter.

control of her clipboard at all times during the flight. R., Vol. II, pp. 240-241. His opinion is that her failure to control the clipboard proximately caused the crash. *Id.*

This later opinion is particularly important here. Mr. Stimpson, in the application of his expertise and based on his review of the evidence, has come to the conclusion that if Schiff had maintained control of the clipboard, it would not have left the cockpit, and the crash would have been avoided.

Colin Sommer

It can fairly be said that Fish & Game's expert Colin Sommer grew up with aviation accident investigation: his father is a well-known investigator, and Sommer worked for his father in his youth. R., Vol. I, p. 158. Sommer earned his engineering degree at the University of Michigan in 1997, and, within a few years, he went to work full time with his father in investigating accidents. *Id.* at 155-157. He has investigated over 350 aviation incidents in the 12 years he has been working with his father. *Id.* at 155-156, 159; *See also id.* at 160-163. Unlike Stimpson, and Krinitt's other expert Larry Grandy – both of whom have been flying helicopters since the Vietnam War – Sommer is not a helicopter pilot.

For this investigation, Sommer inspected the wreckage of the helicopter, reviewed extensive documentation assembled by the various state and federal investigators, reviewed the maintenance records and other documents produced by the owner of the helicopter, examined a Hiller similar to the one involved in the crash, reviewed key deposition transcripts, and performed his own analysis recreating the flight path of the helicopter, and plotting the location of two eyewitnesses to the crash. *Id.* at 164-182, 196-197, 199-200.

Krinitt does not agree with some of the conclusions Sommer has reached, and has issues with his qualifications (and methodology) with respect to Schiff's legal status on the mission, and with his methodology for reaching his opinions concerning how, and how far, the cockpit door came open.[4] There is, however, no basis to contest Mr. Sommer's qualifications or methodology underlying his conclusions that (a) the unscheduled landing in Kamiah was not for a mechanical emergency (b) the crash was caused by the Fish & Game clipboard hitting the tail rotor; (c) the clipboard was inside the cockpit prior to the accident; (d) Schiff was sitting on the right side of the helicopter; and (e) the clipboard exited the cockpit through an open right side

[4] In Krinitt's view, Sommer's conclusions concerning how far the door opened are directly contradicted by the evidence. *See* R., Vol. I, p. 136, 091.

door. *Id.* at 188-196, 53-57, 60. He reached these conclusions following his normal protocol for investigating an aviation accident *see id.* at 183-184, and is arguably qualified to have engaged in the process that led to these conclusions.

Nothing in Mr. Sommer's report, or in his deposition, suggested that the pilot would or could have had control over the clipboard prior to the accident.

Larry Grandy

Mr. Grandy was engaged to provide rebuttal testimony to Mr. Sommer's opinion testimony. R., Vol. II, p. 245 His qualifications are also extensive: as set forth in paragraph 2 of his affidavit, Grandy is an FAA certificated helicopter pilot with ratings as an Airline Transport Pilot, Certificated Flight Instructor (Helicopter) Instrument; he has over forty-six years of flying experience, and approximately 8,850 flight hours; in addition to his military flight service, Grandy has served as company Chief Pilot, FAA 135 Check Airman, Flight Instructor, Training Coordinator, and Safety Officer; he currently serve as an Emergency Aeromedical Services helicopter pilot; as a safety consultant and expert witness, he has investigated over fifty aircraft accidents, most involving helicopters; Grandy is a graduate of the University of Southern California's Aviation Safety and Security Program.

Although Mr. Grandy did not review the wreckage personally, he was provided with the photographs taken by Mr. Stimpson, Mr. Sommer, and others at the December 7, 2011 wreckage inspection. In addition, Mr. Grandy reviewed NTSB Report WPR10FA440; NTSB Docket WPR10FA440; the Federal Aviation Regulations; the US Department of Interior Final Report concerning this accident; the USDA Forest Service Report; various law enforcement agency reports; the depositions of Jim Pope Jr., Mike Atchison, Luke Rinebold, Jay Crenshaw, Joseph Dupont, Clay Hickey, and Colin Sommer; the expert reports of Doug Stimpson and Colin Sommer; documents produced by Leading Edge Aviation and Fish & Game (including the flight safety training histories for Ms. Schiff and Mr. Barrett); the Aviation Training Modules and photographs of the accident scene, and from the wreckage inspection. R., Vol. II, p. 246, ¶3. On January 9, 2014, he had a telephone conference with Jim Pope and Sparky Bloodsworth, the Leading Edge mechanic. *Id.* at R., Vol. II, pp.246 ¶3, 253 ¶17.

Based on his review of the evidence, and utilizing his extensive experience, Grandy concluded that Sommer's conclusions that the door handle modification was improper was mistaken (*see id.* at ¶12), and that his conclusion that the door opened spontaneously was also unfounded. These conclusions are explicitly based on the

evidence that the door had been fixed (*Id.* at ¶16, citing R., Vol. I, pp. 150-151 & interview with Pope), the incidents relied upon by Sommer were different (*Id.* at ¶14, citing, inter alia, R., Vol. I, p. 152), the door handle would have been blocked by Schiff (*Id.* at ¶18, citing the interview with Pope and two photographs of the Hiller).

* * *

None of the experts offered an opinion that the clipboard was in the possession of the pilot immediately (or ever) prior to the accident. There was simply no evidence upon which such an opinion could have been based: not only were there no eyewitnesses to the pilot taking charge of the clipboard, no witness or expert suggested that a pilot would or could take on this burden during flight. No biologist or pilot testified that a pilot had ever taken control of a biologist's clipboard during or in connection with a flight. There was nothing in the pre-flight briefing to suggest that anyone other than the biologists would be responsible for their items during the entire flight. No expert, or indeed any other witness or investigative authority, explained how the clipboard could have gotten from out of the helicopter if the pilot had somehow, for some reason, taken it from the biologist – it would have had to pass through Schiff who would have been blocking the barely open door – because, again, there was simply no factual basis whatsoever to ground such a theory.

What is also not at issue is what happened after the clipboard left the cockpit: because of the forward motion of the helicopter, the clipboard hit the tail rotor of the helicopter, which caused the drive train to break. With the complete loss of rotor, and balance, the helicopter spun out of control and crashed. The pilot and both biologists were killed in the crash.

ISSUES PRESENTED ON APPEAL

1. Whether the district court properly applied the summary judgment standard.

2. Whether the district court erred when it concluded that *res ipsa loquitur* could not be applied in this case.

3. Whether the district court erred when determined that the only foreseeable trajectory for the clipboard was straight down.

4. Whether the district court erred when it concluded that the Fish &Game's failure to give its biologist the required training was not a cause of the accident.

5. Whether the district court erred when it failed to rule on, and deny, Fish & Game's motion to strike expert testimony.

6. Whether the district court erred when it failed to conclude that plaintiff had raised a genuine issue as to whether Fish & Game caused the door to be open.

ARGUMENT

I. Standard of Review

On review of a summary judgment the Court applies the same standard that the district court was supposed to have applied. Summary judgment is appropriate only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Fuller v. Callister*, 150 Idaho 848, 851 (2011) (quoting *Castorena v. Gen. Elec.*, 149 Idaho 609, 613 (2010)). Affidavit testimony from experts may be relied upon to defeat a motion for summary judgment, and a district court's refusal to heed fact disputes raised in such affidavits is reversible error. *Major v. Security Equipment Corp.*, 155 Idaho 199 (2013).

Under a proper application of this standard, the district court was required to deny Fish & Game's request for summary judgment if there was sufficient factual evidence from which a qualified expert (among other witnesses) could offer

competent, fact-based testimony that would allow (but not necessarily compel) a reasonable juror to reach conclusions concerning the material facts at issue in this accident. *See Van v. Portneuf Medical Center*, 147 Idaho 552, 556 (2009). "The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment." *Id.* (citing *Finholt v. Cresto*, 143 Idaho 894, 896 (2007)).

The Court may not weigh one side's experts against the other's. *Nield v. Pocatello Health Services*, 332 P.3d 714, 728 (Idaho 2014). Rather, for purposes of this appeal, the Court must decide whether Krinitt's experts, who between them have investigated hundreds of aviation crashes (and logged thousands of hours flying helicopters), had a factual basis for the conclusions they drew. If so, the judgment of the district court must be reversed, and the jury must be allowed an opportunity to hear their testimony and weigh it against the evidence (including the testimony of Fish & Game's expert).

II. The District Court Erred in Rejecting Plaintiff's Contentions Regarding *Res Ipsa Loquitur*

Although, as discussed below, there is sufficient evidence to create a genuine issue concerning whether and why Schiff opened the door, a lack of evidence for her motive for doing so does not affect the state's liability for the consequences of her

having allowed the clipboard to exit the cockpit. That is, even if there was not sufficient evidence of motion sickness, this case would still go forward. This is because failing to properly medicate against motion sickness prior to the flight – is but one of the negligent acts of Fish & Game employees that was a but-for cause of this crash. There is nothing surprising about this at all: it makes no difference in the law why a drunk driver drinks, or why a preoccupied airline pilot fails to check the fuel level. It is enough that they have done so. Here, the evidence is strong – disputed, but strong – that Schiff opened the door on purpose. Whether she was sick, or Barrett was sick, or neither of them were sick, the consequences that flowed from this act are imputable to Fish & Game. And, as is obvious to all, those consequences were fatal.

Similarly, the dispute between Krinitt's experts and Fish & Game's expert about how the door came to be open was also no reason to grant summary judgment for Fish & Game. Regardless of how the door came to be open, Schiff was supposed to retain control of her clipboard. R., Vol. II, 240-243 (citing Fish & Game Helicopter Passenger Briefing). Her failure to do so was negligent. And, whether the jury credits Krinitt's experts or, somehow, Fish & Game's expert, on the cause of the

door coming open, it would still come to the same place: Schiff's negligent failure to maintain control of the clipboard caused the accident.[5]

In this respect, the case presents a fairly classic example of *res ipsa loquitur.* As the Court held earlier this year,

> Res ipsa loquitur "creates an inference of the breach of the duty imposed and replaces direct evidence with a permissive inference of negligence." *Christensen v. Potratz*, 100 Idaho 352, 355, 597 P.2d 595, 598 (1979). Res ipsa loquitur only applies when a plaintiff proves two elements: (1) the defendant exclusively controlled and managed the agency or instrumentality that caused the injury; and (2) the circumstances permit "an average layperson to infer, based upon common knowledge and experience, that the plaintiff would not have suffered those injuries in the absence of the defendant's negligence." *Enriquez v. Idaho Power Co.*, 152 Idaho 562, 566, 272 P.3d 534, 538 (2012).

Morgan v. New Swed Irr. Dist., 322 P.3d 980, 990 (2014). The eyewitnesses agree that Schiff had the clipboard in the cockpit, all three experts agree, based on their review of the evidence, that the crash was caused by her clipboard striking the tail rotor. While expert analysis is necessary to show that the crash was caused by the clipboard hitting the tail rotor – a proposition to which both side's experts agree -- beyond that, the jury can conclude, based on their common knowledge and experience, that the clipboard did so because Schiff failed to control it, regardless of (1) how the door

[5] Of course, if Schiff opened the door, as the evidence indicates and Krinitt's experts conclude, she should have known to be particularly diligent in handling her clipboard.

came to be open and/or (2) Schiff's motive for opening the door (if she opened the door intentionally, as the evidence indicates). No speculation is required here: her failure to control the clipboard as the proximate cause of the crash is as obvious as a barrel of flour falling from a second story window, *Byrne v. Bodie,* 159 Eng. Rep. 299 (1863), or a steam blast injuring sailor performing ordered tasks in front of the exhaust pipe, *Wilson v. St. Joe Boom Co., Ltd.,* 34 Idaho 253 (1921), or spraying herbicide that kills plants, *Wing v. Clark Air Serv.,* 106 Idaho 806 (1984).

The district court, however, rejected application of *res ipsa loquitur* in this case, finding that Krinitt had not proven that Schiff actually had control over the clipboard just before it left the cockpit. This is error for two reasons: first, it is a reversal of burdens set forth in the summary judgment standard. At this stage of the case, it is not incumbent upon Krinitt to show that res ipsa **must** apply on the facts in evidence, rather it is incumbent upon Fish & Game to show that it **cannot possibly** apply. The second flaw in the district court's reasoning is that Fish & Game did not, because it could not, meet its burden. In response to the logical and evidence based argument Krinitt made, Fish & Game, and the district court, offered nothing but fact free speculation. No witness saw the pilot take control of the clipboard. Neither of the Leading Edge pilots testified that they had ever taken control of a biologist's clipboard

in connection with a mission. None of the Fish & Game employees who testified indicated that any Leading Edge pilot, or any other pilot, had even taken control of their clipboard. None of the experts offered an opinion that pilots sometimes, or even ever, take control of a biologist's clipboard. In contrast, the admonition that Schiff would be responsible for the clipboard was made in the pre-flight briefing, and would have been made in the mandatory classroom training, had she been required (as the regulations plainly direct) to take the class.

If the pilot had had the clipboard – and there is no evidence of any kind that he did – it would have had to pass through Schiff to get to the door, because the pilot was in the middle of the helicopter. The cockpit of this helicopter was a very tight fit. No evidence was offered that hints, even in the slightest, that the clipboard would or even could have been anywhere but under the control of Schiff (that is, either on her lap or between her feet). Which, of course, makes perfect sense because the only reason the clipboard was in the helicopter at all was because Schiff intended to use it to record the observations of her colleague, the senior biologist Barrett.

The question here should not be whether Krinitt has presented enough evidence for the district court to have granted him summary judgment on res *ipsa loquitur*, but whether Fish & Game has presented enough evidence to forestall even jury

consideration of this case. Given that Fish & Game presented *no evidence at all* upon which a juror could base the conclusion that the pilot might, in addition to using both hands to fly the helicopter, have also taken on the responsibility of holding the clipboard, the district court's conclusion was error and must be reversed.

III. The District Court Erred in Concluding That It Was Only Foreseeable That the Clipboard Would Fall Straight Down

Fish & Game did not raise foreseeability in its motion for summary judgment, nor did it (or its expert) present any evidence of any kind indicating that a person in Schiff's position would think a clipboard would fall straight down from a moving helicopter. The district court engaged in pure fact free speculation on the matter, however, in concluding that "it would be expected that any object dropped from height would fall towards the ground." R., Vol., II, p. 398. It added, again without any reference to any evidence, including the location of the helicopter at the time of the crash, that

> [i]f an object was dropped from a helicopter preparing to land it would be expected that the object would be forced towards the ground at a rate greater than gravity due to the downward thrust of air from the rotors immediately about the cockpit.

R., Vol., II, p. 398. In the context of this case, this is not just error, it is irresponsible. The district judge did not seem to understand that the helicopter was miles away from

its landing spot – this is an obvious danger of deciding issues that haven't been argued: neither party had presented the evidence to the district court concerning the location and attitude of the helicopter at the time of the accident, because neither was arguing any position on the motion that made its attitude at that moment relevant. It is undisputed that, as a matter of fact, the clipboard went from the cockpit to the tail rotor. Contrary to the district court, there is no mystery "how the clipboard got all the way back to the rear rotor." R., Vol., II, p. 398 It got there because the helicopter was moving forward at speed. The district court's speculations about what the biologists might have thought in a helicopter that is descending vertically from a hover to its landing spot are therefore completely unrelated to this case.

What would have been relevant – had it been raised in the motion -- are the expectations of someone in a moving vehicle. Any person who has ever travelled in a moving vehicle would know that dropping an object out of the vehicle – especially a light object with air resistance, like a hollow aluminum clipboard, would fall in a manner, relative to the moving vehicle, towards the rear.

Fish & Game did indicate, in its reply brief, that after the accident some pilots at Leading Edge changed their practices concerning how they secured clipboards

when flying.[6] Obviously, corrective action is not admissible to prove negligence, Idaho R. Evid. 407, and anyway, after the deaths of three people and the loss of an aircraft, one would expect Leading Edge to become ultra-vigilant about such things as clipboards[7]. The pilot's employer Mr. Pope – a defendant in a negligence suit at the time of his testimony – testified that before the accident he "did not recognize it [a loose clipboard] as a hazard." R., Vol. I, p. 140. If it was all he had to say on the matter, this testimony would be belied by the training that both pilots and Fish & Game biologists get concerning loose objects, by the testimony concerning the pre-flight briefing, and by the district court's own findings that securing loose objects was necessary, such that a failure to do so would have been negligence. However, the statement does not stand alone: later in the deposition, Pope explained himself – he did not think of clipboards as a hazard, because he expected the biologists to hang on to them.[8] Pope's testimony does not indicate that he would have thought that a clipboard that exited the cockpit of a moving helicopter could not have hit the tail

[6] Arguments first raised in a reply brief are not bases for the grant of a motion which are required to be set forth in a motion, pursuant to Rule 7. *See Franklin Building Supply Co., Inc. v. Hymas*, 2014 Opinion 123 at 11 (Nov. 28, 2014).

[7] There was and still is no state or federal regulation requiring lanyards for items like clipboards.

[8] Pope 124-25 (included in Exhibit C to the Certificate of Peter J. Johnson Regarding Defendants Response Memorandum, filed May 8, 2014), *see* R., Vol. II p. 383. This deposition testimony was inadvertently left out of the record on appeal, and is the subject of a Motion to Augment Record, filed on the same day as this brief.

rotor, the inference the district court seems to have drawn from it. The district court's interpretation of this testimony would be unsupportable on any standard, but when considering a motion for summary judgment, where inferences are to be drawn in favor of the non-moving party, it amounts to further reversible error.

IV. The District Court Erred in Finding Schiff's Qualifications Under Fish & Game's Flight Regulations to Participate in the Flight Irrelevant

Fish & Game has fairly comprehensive regulations concerning its employees' use of both helicopter and fixed wing aircraft in the performance of their duties. These include classroom training no less often than once every three years. In order to be qualified to work on a flight in August 2010, then, Schiff would have had to have had classroom training in or after 2007. It is undisputed, however, that her most recent classroom training took place in 2003. R., Vol. I, p. 107. In addition, she would have had to sign an acknowledgement of having read the regulations, and provided it to her supervisor.

No provision of the regulations allows a Regional Flight Safety Officer to waive the training requirements set forth therein. Nonetheless, Crenshaw told Schiff that she could participate in the flight if she did two things: (a) take the online courses that are designed to supplement the required classroom training and (b) sign the

acknowledgement as required by the regulations. R., Vol. I, pp. 075-078. Schiff did not fully meet even these relaxed requirements, although she appears to have taken the online courses. The regional flight safety officer assumed that online training was sufficient, without reading the regulations. R., Vol. I, pp. 077, 103, 104. He also mentioned a critical difference between in-person training he has taken and the online modules: the former included an instruction to "hang onto your clipboard." *Id.* at R., Vol. I, pp. 092-094. There is no evidence that Schiff complied with Crenshaw's instruction that she sign the acknowledgement.[9]

Fish & Game should not, by its own regulations, have put Schiff on that flight. It should instead have arranged for her to obtain the proper qualifications – which it certainly could have done – or find someone else to go on the trip that year, such as, *e.g.*, the woman from the communications who went on the same survey in 2008. R., Vol. I, p. 128. And the consequences of this violation on the part of Fish & Game were dire: Schiff caused the crash, killing herself, her fellow biologist, and the pilot.

[9] Fish & Game refused to admit that it does not have her signed acknowledgement, but was unable to produce it. Neither the regional flight safety officer nor Schiff's supervisor has a copy. R., Vol. I, pp. 105-106. Inasmuch as she was instructed only a few weeks before the accident to sign the acknowledgement, and that immediately after the accident the relevant records were reviewed in preparation of a report concerning Schiff's training status, which report did not include the acknowledgement as an attachment, the only inference that can be drawn is that she did not sign the acknowledgement in the summer of 2010. In this and other respects, implementation and management of the safety program for the Clearwater Region is decidedly unimpressive. *See* R., Vol. I, pp. 086-088, 095-103.

This failure to apply the regulations to Schiff amounted to negligence per se. To prevail on a theory of negligence *per se*, a plaintiff must show that "(1) the statute or regulation must clearly define the required standard of conduct; (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation must have been the proximate cause of the injury." *O'Guin v. Bingham County*, 139 Idaho 9, 16 (2003). Fish & Game's regulations concerning training – and not being allowed to fly without proper training -- were adopted in the wake of aviation crashes for the purpose of safeguarding the lives of helicopter occupants. R., Vol. II, pp. 339-340. In addition, the requirement that she maintain control of items in the cockpit is also clearly designed for the safety of the mission. *Id.* As is discussed above, jurors will certainly be able to determine based on the evidence whether or not Schiff's improper and negligent participation in the mission was a but-for cause of the crash.

Before the district court, Fish & Game argued that its regulations, despite their mandatory language and salutary purpose, cannot support a claim of negligence per se, because the regulations were not adopted with notice and comment, citing *Service Employees Intern. Union Local 6 v. Idaho Dept. of Health & Welfare*, 106 Idaho 756 (1984),

and *Mallonee v. State*, 139 Idaho 615 (2004). R., Vol. II, p. 380. These cases stand for no such thing. In both *Mallonee* and *Service Employees*, plaintiffs tried to make violation of an internal regulation into a private right of action. Neither addresses negligence *per se*. Krinitt is not relying on Fish & Game's regulations to provide a private right of action here, his cause of action is provided by the Idaho Tort Claims Act and the Wrongful Death Act. What the Fish & Games regulation at issue does is define a duty that Fish & Game is obliged to follow: to save lives in Fish & Game flight missions, biologists must be adequately trained.

The district court did not rule explicitly on Schiff's qualifications, or whether or not her lack of qualifications could amount to negligence per se, but found instead that, despite the fact that the training Schiff skipped would have included an admonition to retain control over the clipboard, her lack of qualification did not cause the accident. That is, the district court found that the violation of the safety regulations was not a proximate cause of the crash. This is mistaken for two reasons: full compliance would have been one more reminder to safeguard her item, and she should not have been on the flight at all. As to the first, Krinitt has certainly presented enough evidence for a jury to conclude whether training, which would have taken place less than a month before the accident, and which would have included an

admonition to safeguard loose objects, would have impacted the accident. The argument that it could not have done so is a form of nihilism: a denial that safety training works at all. The clearly articulated policy of Fish & Game, however, is consistent with confidence that training is effective, and that inadequately trained biologists are not to be rushed into service, but are to be given the mandatory training. See R., Vol. II, pp. 339-340.

As to the second, obviously, no one can know what would have happened had some other, flight qualified, Fish & Game biologist – or other staffer, as was done in the past – had gone on the flight. The probability is very strong indeed that a properly trained person would have safeguarded her items, as training, briefings, and experience indicates. It is strong enough that a jury should be allowed to consider it.

Because the evidence points strongly towards Schiff having had control over (and responsibility for) the clipboard prior to the accident, and that she failed to adequately safeguard that clipboard, which was the cause of the accident, Krinitt has shown sufficient evidence to proceed on his negligence claim.

V. The District Court Erred in Failing to Rule Favorably on the Admissibility of Expert Testimony

Fish & Game objected to the testimony of both Stimpson and Grandy, moving to strike them. The district court ignored this motion, along with the testimony of both experts, making no ruling at all on admissibility. As the Court noted in *Nield*, a "trial court's failure to determine the admissibility of evidence offered in connection with a motion for summary judgment is error that may not be remedied on appeal." 332 P.3d at 726 (quoting *Montgomery v. Montgomery*, 147 Idaho 1, 6 (2009)). The district court should have denied the motion to strike, and its failure to do so was error.[10]

A. Stimpson's Evidence is Admissible

Fish & Game's litany of reasons for contesting the admissibility of Stimpson's conclusions – introduced in a reply brief rather than Fish & Game's opening brief although Fish & Game had had Stimpson's report for nearly two months at the time it filed its opening brief – amounted to little more than disagreement on the part of Fish & Game with his conclusions.

[10] The district court may have been confused, because, at oral argument, Fish & Game withdrew one of its contentions for striking the Grandy testimony. Tr. at 5. From the context, though, it should have been clear to the district court that Fish & Game only intended to withdraw its timeliness argument, not the motion as a whole.

Four of the six arguments Fish & Game presented have to do with whether or not Stimpson has sufficient factual basis to have concluded that airsickness was a factor in this crash, despite the fact that Krinitt has shown that his claim does not depend on whether or not Schiff (or Barrett) was experiencing airsickness. Nausea is only relevant here as the reason for opening the door. If, as Krinitt has argued, the reason for opening the door is not material to his negligence claim, then the opinion of Stimpson on this issue (among several he opined about) is not case dispositive.

The evidence upon which Stimpson relied to form his opinion is, as everyone admits, circumstantial. Schiff had expressed some concern about airsickness prior to the flight. R., Vol. I, p. 144. There was an unused nausea band in the wreckage. The door was open prior to the clipboard exiting the cockpit. The mission was interrupted by an unscheduled landing, the ordinary causes for which clearly did not apply. These are facts, and a skilled and experienced accident reconstructionist – as Stimpson clearly is – must put them together to find a conclusion that fits the evidence, and is not contradicted by the evidence.

As noted here and in Krinitt's opposition brief, even if Stimpson's conclusion that nausea was a likely contributor to the crash were excluded, the bulk of his

conclusions would still stand. They are not dependent on her having become nauseated (or indeed, on Barrett having become nauseated).

In addition to Stimpson's opinion regarding nausea, Fish & Game also attacked Stimpson's conclusion with respect to Schiff's Training. And as to whether Schiff's lack of proper training was a causal factor in the crash, the evidence for Stimpson's conclusion is clearly sufficient. That Schiff had not had the training required by Fish & Game's own rules is indisputable – and this fact is not affected by Crenshaw's apparent ignorance of his agency's rules. The rules themselves are clear and unambiguous, and were not complied with. Schiff should not have been on the flight.

That her lack of training was a factor in the accident is similarly fact based. Her clipboard, which she had brought along to use on the mission, exited the cockpit and caused the accident. This is not in dispute. The training that she skipped would have included (a) an instruction to secure loose objects, and (b) handouts such as that cited by Stimpson directing Schiff to maintain security of her clipboard.

The conclusions about nausea and Schiff's training are not the only conclusions offered by Stimpson, and striking them would not be case-dispositive. The other opinions – notably that Schiff opened the door for whatever reason and failed to

control the clipboard for whatever reason -- do not depend on the validity of these opinions. Consequently even if the district court had concluded that the opinion relating to nausea and training are not adequately based on the evidence, this is still not sufficient basis to strike Stimpson's other opinions.

B. Grandy Supplied Adequate Factual Basis For His Conclusions

Fish & Game also complained that Grandy's affidavit does not provide sufficient factual support for the conclusions that he draws. Fish & Game specifically points to two statements in the Grandy Affidavit that, it claims, miss the mark: (1) Grandy's opinion that "A likely reason for the exit of the clipboard was that Ms. Schiff experienced significant nausea, opened the right cockpit door, and allowed the clipboard to exit the cockpit" and (2) Schiff "did not maintain the required level of security" over the clipboard. With respect to both of Grandy's conclusion, it is important to keep in mind that the Grandy Affidavit, and his report, is offered as rebuttal to the Sommer Report. Sommer expressed the opinion that the clipboard slipped out of the cockpit when the door inadvertently opened. Grandy's rejoinder is that the door did not open inadvertently – conclusions he reached because (a) the door had been fixed and (b) Ms. Schiff blocked the handle from coming forward, which would prevent inadvertent opening. These conclusions are solidly based on

facts, including the deposition testimony of Pope, an interview with Pope, and careful study of the door handle and its placement. Grandy further concluded that even if the door had come open by itself, Schiff should have maintained control of the clipboard – this too is based on the fact that however and whenever the door came open, she did not maintain control over the clipboard.

Fish & Game complained that in conducting his investigation, Grandy spoke with the owner of the helicopter and his mechanic about repairs to the helicopter, claiming that these conversations are hearsay. Grandy has personal knowledge of the statements made to him by Pope and Bloodsworth, and his opinions based on those statements are admissible: Idaho Rule of Evidence 703 specifically allows an expert to base his opinions on inadmissible matter. Under that Rule, Grandy may not disclose the content of his conversations to the jury at trial unless or until the district court is satisfied that the probative value of the expert's opinion outweighs the prejudice of admitting otherwise inadmissible evidence. Krinitt anticipates having Pope testify at trial, which will completely obviate this issue prior to presentation to the jury. Grandy's reliance on his own interviews with the principals in forming his opinions provides no basis for striking the Grandy Affidavit at this point.

C. Fish & Game's Expert did not Offer an Opinion that Krinitt's Experts had Insufficient Factual Basis for their Conclusions

The question whether the evidence examined by the experts was sufficient basis for the opinions they offered should itself be a matter of expert opinion. Whether a given bit of evidence supports a given conclusion made as part of a professional exercise may itself be a matter for the application of a skilled professional, exercising an established methodology. The district court is not an accident reconstructionist, and has only a layman's understanding of what a proper methodology in conducting that investigation would be, and how much evidence is required to reach particular conclusions. The record of the district court in this case is particularly dismal, having reached wrong conclusions, based on a misunderstanding of several facts, including which way the helicopter was going when the clipboard went out the right door, and what the clipboard going out the right door ineluctably tells an experienced investigator about who had it. If Fish & Game's expert believed that Krinitt's experts were reaching conclusions on insufficient facts, he could have offered that as an opinion. Instead, all the district court had was *ipse dixit* from Fish & Game's lawyer, and its own speculation.

D. Implicitly Granting the Motion to Strike Would Have Been an Abuse of Discretion

Nothing in the district court's opinion indicates that it intended to grant the motion to strike implicitly. The Court "applies an abuse of discretion standard when determining whether testimony offered in connection with a motion for summary judgment is admissible." *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15 (2007). "A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909 (2008).

Here, there is no sign that the district court engaged in any of these three steps. It made no reference to the motion, much less its discretionary function. It gave no specific indication that it considered the bases asserted by the experts for their decisions. The exercise of reason, in a case like this, would have to involve examination of the standards of crash investigation, and whether Stimpson and Grandy had failed to meet them. The district court opinion shows no sign that made an effort to engage in that process.

VI. The District Court Erred in Failing to Find that Krinitt had Advanced Sufficient Evidence to Show a Genuine Issue of Fact as to Whether Fish & Game Caused the Door to be Open

As Krinitt has shown above, Fish & Game is liable for the death of the pilot regardless of how the right side door of the helicopter came to be open. The experts hired by each side found no evidence to suggest that the pilot had had control over the clipboard prior to the accident, and so both focused on how the door came to be open as the critical issue in the case. If the district court had properly engaged with the evidence, and the conclusions of the experts, it would have found that there is a genuine issue of fact as to how the door came to be open. Instead, the district court ignored the opinions of all the experts, and instead engaged in fact free speculation.

Strictly speaking, the Court would be within its rights to reverse and remand without consideration of whether or not there was a genuine issue of fact as to how the door came to be open – indeed the Court should do so, because, considering Schiff's duty to safeguard her clipboard, the question of how the door came to be open is not material. If it was material, however, Krinitt has, as he demonstrated to the district court, raised a genuine issue such that the judgment cannot be affirmed.

As described above, the experts offer two different evidence-based explanations for how that door came to be open: Krinitt's experts can show that

Schiff very likely opened the door herself, based on their careful review of the evidence, and Fish & Game's expert argues that the door popped open spontaneously (based, *inter alia*, on evidence that this same door had popped open spontaneously in the past). If the case is remanded, the district court will instruct the jury as to how it should weigh the opinion testimony of the competing experts. It is simply untrue, however, that Krinitt would be asking the jury to engage in fact free speculation. Instead, it will be tasked with doing what jurors always do: listen to the evidence, observe the witnesses, weigh competing interpretations of the facts, and judge whether Krinitt has proven that his explanation is more likely than not.

A. The Experts and their Opinions

No one expects the jurors to be able to look at this wreckage, and the other evidence, and sort out all by themselves what happened. Consequently, although one would not know it from Fish & Game's motion, both sides have engaged very experienced accident investigators. As with Stimpson and Sommer, Grandy will be giving opinion testimony based on their experience and review of the evidence.

However one might describe the process the jury will go through to decide how to weigh the testimony of all three experts; it cannot be characterized as fact free

speculation. The district court, however, completely ignored both expert opinions. It did not even rule that the opinions were unsupported by the evidence – as Fish & Game had urged – but simply failed to engage with any of their opinions, or the factual bases offered in support of their opinions.

B. The Evidence Indicates that Schiff Opened the Door

As noted above, all three experts concluded, based on their review of the evidence, that the clipboard exited Schiff's door. There is testimony from eyewitnesses, that Schiff (rather than the other biologist) had the clipboard – and intended to use it on the mission. R., Vol. I, pp. 069-070, 139, 141. Where the experts disagreed, based on their review of the evidence, is how the door came to be open. Fish & Game's expert concluded that the door opened on its own, because this particular door had a history of opening on its own. R. Vol. I 200; *but see id.* at 188. Krinitt's experts, however, concluded that it would not have opened on its own because (a) the door was repaired prior to the mission and (b) when there is a passenger in the right hand seat, the passenger blocks the handle. The prior instances of spontaneous door opening were under very different operating conditions than this mission. R., Vol. I, pp. 187, 188. The evidence for this latter conclusion is quite overwhelming, and the jury need not rely solely on the opinions of experts: the actual

seats and door assemblies from the wrecked helicopter will be exhibits at trial, and jurors will be able to judge for themselves whether a passenger sitting in the right hand seat would have blocked the door handle from shaking open by itself.

C. The Evidence Indicates that Schiff Most Likely became Nauseous

The explanation that most closely fits the evidence here is that Schiff opened the door because she was feeling ill. There are a number of evidentiary bases for this conclusion. Schiff mentioned her prior motion sickness to Pope prior to the flight. R., Vol. I, p. 144. The wreckage included an unused anti-motion sickness band, secured in the external storage, R., Vol. II, pp. 361-362, which probably belonged to Schiff – because it did not belong to Leading Edge or Perry Krinitt, and very likely did not belong to Barrett, who owned and flew his private aircraft.[11] R., Vol. I, p. 127. It is not uncommon to crack a helicopter door when a person is feeling ill.[12] *See* R., Vol. II, pp. 222-223. The unscheduled non-emergency stop is also probative here. *Id.* at 221-222. Given the concerns about motion sickness, the fact that the door very likely

[11] Fish & Game's lawyer has indicated that it believes that Barrett, rather than Schiff, had a predilection for motion sickness. R., Vol. II, p. 212. Krinitt is not aware of *any* evidence for this proposition, but notes that it does not matter for his theory of liability whether Schiff opened the door because **she** was feeling ill, or opened the door because **Barrett** was feeling ill.

[12] Indeed, jurors will likely have experience with the same phenomena related to car sickness.

to not come open by itself, and the very limited number of reasons that Schiff might have opened her door, it is more likely than not that she did so because of nausea.[13]

D. Krinitt Presented Sufficient Evidence to Raise a Genuine Issue

Before the district court, Fish & Game relied primarily on the Supreme Court's holdings in *Dent v. Hardware Mut. Casualty Co.,* 86 Idaho 427 (1963), and *Petricevich v. Salmon River Canal Co.,* 92 Idaho 865 (1969), for its contention that Krinitt's case is too speculative to go forward. Both cases are readily distinguishable from this thoroughly investigated, and fairly well understood, accident. *Dent* arose from a single car automobile accident, where the parties were divided over whether the hemorrhage that caused the fatality was the result of the accident, or the cause of the accident. "No one witnessed the accident itself, and there were no tire marks, skid marks, or other direct or objective evidence that would give support to either party's contentions." 86 Idaho at 431. The experts were divided on causation, but the most the plaintiff's expert would say is that while the defendant's theory of the accident might be correct, the plaintiff's version might also have been correct: on cross

[13] The district court claimed that there was no direct evidence that Schiff became sick. This may not be the fault of Krinitt. One piece of evidence which might have been probative on the question whether Schiff became airsick during the flight would be her Fish & Game flight suit. It was destroyed by Fish & Game – first dry cleaned, and then put out in the trash (R., Vol. I, pp. 089-090)– before it could be analyzed.

examination, he said that plaintiff's version was "a little more likely." *Id.* at 433. The Court found the record bereft of evidence of probative value that could tip the balance one way or the other. *Id.* at 436. The contrast with this case is clear: here, one expert disagrees on how the door came to be open, and there is evidence upon which the jury can conclude that Krinitt's theory is correct.

Petricevich involved a more subtle proposition, one that is not in play in this case. The dispute was over who burned the railroad tie, which served to block livestock from leaving a pasture through a vertical gap in the fence, where an irrigation ditch passed the property line. 92 Idaho at 866-67. In the face of an unequivocal statement from the irrigation company that it did not start the fire, plaintiff offered only testimony that the irrigation company had a habit of starting similar fires. Id. at 869. The Court found this evidence to be inadmissible, which meant there was no genuine issue of material fact as to whether the irrigation company started that particular fire. *Id.* at 870-72. Here, there is considerable admissible evidence for Krinitt's description of the accident.

There was, in sum, sufficient evidence to present a genuine issue of fact as to whether a Fish & Game biologist experienced motion sickness on the flight, and that this a was part of the sequence of events that led to the crash. Even if there was not,

however, this case would still have gone forward, because Fish & Game's negligence after the biologist began feeling nauseous – opening the door and letting the clipboard come out of the door -- led directly to the crash. The authorities cited by Fish & Game, and the Fish & Game motion itself, go only towards the argument whether there is sufficient evidence of Schiff's nausea. Because the case should still have gone forward whether or not this evidence is permitted at trial – and it should be – the motion should have been denied.

CONCLUSION

For the foregoing reasons, Krinitt requests that the judgment of the district court be reversed, that the case be remanded to the district court with instructions to deny Fish & Game's motion for summary judgment, and to set the matter for trial.

DATED this the 8th day of December, 2014.

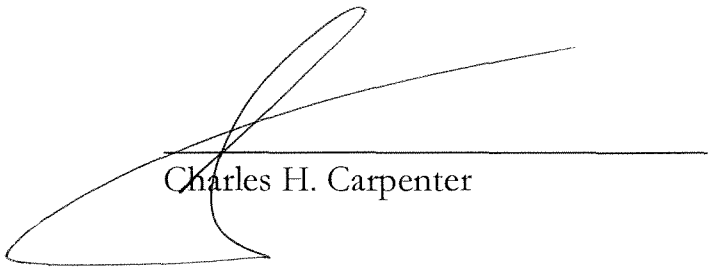
Respectfully submitted

Charles H. Carpenter
CARPENTER LAW FIRM, plc
210 N. Higgins Ave., Ste. 336
Missoula, MT 59802
Telephone :(406) 543-0511
carpentc@carpenterlawfirmplc.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2014, I served the foregoing by mailing a true and correct copy to:

Peter J. Johnson
JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317



Charles H. Carpenter